

No. 41256-0-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

MICHAEL LOPEZ, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber Finlay, Judge

No. 09-1-00442-1

**SUPPLEMENTAL BRIEF OF RESPONDENT
(In Response to Supplemental Brief of Pro Se Appellant)**

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A. State's Counterstatement of the Issue Pertaining to Lopez's Assignment of Error in His Supplemental Brief

During jury selection at the start of Lopez's trial, one of the prospective jurors openly disclosed that he was the brother of the prosecutor's wife's father. Lopez did not object to this juror or move to have the juror removed for cause. However, Lopez used a peremptory strike to have the prospective juror removed; therefore, the juror did not sit on the actual trial. Lopez then accepted the jury as impaneled even though he had one remaining peremptory strike that went unused.

Should Lopez receive a new trial because one of the prospective jurors who did not sit on the actual trial was a family member of the prosecutor's wife?

B. Facts Relevant to Appellant's Issue in Supplemental Brief

The jury in this case was initially composed of twelve jurors plus one alternate juror, for a total of thirteen jurors including the alternate. RP 99. Because an alternate juror was selected, each side was allowed seven peremptory strikes. Supp. RP 165-169.

Prior to the attorneys' *voir dire* of the jury panel, the trial judge asked the jurors a series of questions; one of those questions was, "do any of you know the defendant or any of the lawyers on either side of this case?" Supp. RP 9. Juror number-four raised his card to answer affirmatively to the judge's question. Supp. RP 9.

During the prosecutor's *voir dire* of the jury panel, the prosecutor engaged juror number-four in a series of questions and answers that served

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to disclose that juror number-four was a brother to the prosecutor's wife's father. Supp. RP 94-95.

At the close of *voir dire*, each side passed the jury panel for cause. Supp. RP 165. The prosecutor and the defense then began the exercise of peremptory challenges, one by one, with the prosecutor exercising the first challenge. Supp. RP 165-168. The defendant used his fourth peremptory challenge to strike juror number-four. Supp. RP 167. The defense ultimately used only six of its seven allowed peremptory strikes. Supp. RP 165-168. After using its sixth peremptory strike, the defense accepted the jury as composed and allowed its final peremptory strike to go unused. Supp. RP 168.

C. Argument

Mr. Lopez cites a number of cases to support his assertions that the prosecutor committed misconduct and that Lopez is entitled to a new trial because a member of the jury panel, juror number-four, was related to the prosecutor's wife. Lopez asserts that these circumstances violated RCW 4A.44.180, which reads in relevant parts as follows:

A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:

(1) Consanguinity or affinity within the fourth degree to either party.

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(2) Standing in the relation of guardian and ward, attorney and client, master and servant or landlord and tenant, to a party; or being a member of the family of, or a partner in business with, or in the employment for wages, of a party, or being surety or bail in the action called for trial, or otherwise, for a party....

RCWA 4.44.180.

Lopez asserts that this issue may be raised for the first time on appeal. In the context of the cases cited by Lopez, the State would ordinarily agree and concede this point. However, none of the cases cited by Lopez involve a situation where a juror has openly disclosed that he or she was related to a party in the case. So, the State agrees that where during *voir dire* a juror has failed to disclose facts constituting an implied bias, the issue may be raised for the first time on appeal. *State v. Cho*, 108 Wn. App. 315, 329, 30 P.3d 496 (2001). However, none of the cases cited by Lopez stands for the proposition that a party who knows of an issue of implied bias at trial -- because the prosecutor has openly disclosed the issue during *voir dire* -- may nevertheless raise the issue of implied bias for the first time on appeal (even though the party did not object or move to excuse the juror during *voir dire* after the disclosure was made).

When a party knows of a grounds for implied bias but "a challenge is not made at trial, it is waived." *Ottis v. Stevenson-Carson School Dist.*

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No. 303, 61 Wn. App. 747, 812 P.2d 133 (1991). Because Lopez knew of the relationship between the prosecutor and juror number-four, and because he knew of it before any peremptory or for-cause strikes were offered to the court -- but he nevertheless failed to voice any objection or to move to have the juror disqualified until after the verdict -- he has waived the issue. *Basil v. Pope*, 165 Wash. 212, 5 P.2d 329 (1931). To obtain a new trial because of an alleged implied bias, Lopez "must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 850 (U.S.Kan.,1984).

Additionally, even if Lopez would have moved in the trial court to have juror number-four disqualified for an implied bias under RCW 4.44.180, his motion should have properly been denied because the statute applies to relationships of "consanguinity" and "family." The prosecutor and his wife's father's brother are not related by "consanguinity;" nor are they "family," as "family" is defined. No statutory definition of "family" was located that is applicable specifically to Title 4 of the Revised Code of Washington, but the ordinary dictionary definition of "family" is as

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follows: "[A] group of individuals living under one roof and under one head... [A] group of persons of common ancestry...." The term "ancestry" refers to "lineage," which is defined as a "lineal descent from a common progenitor." THE MERRIAM WEBSTER DICTIONARY (New Edition, 1994). Thus, the prosecutor's wife's father's brother is not a blood-relative of the prosecutor and is not a near-enough relative of the prosecutor to give rise to implied bias under RCW 4.44.180. They do not live under the same roof, and they do not descend from a common progenitor.

"The general rule is: 'A juror is not incompetent in a criminal action because related to the prosecuting attorney....'" *State v. Peterson*, 190 Wash. 668, 669-670, 70 P.2d 306 (1937)(quoting 35 C.J. 321).

Furthermore:

Even if defendant had attempted a challenge for cause, which he failed to do, a juror in a criminal case is not incompetent by reason of relationship to the prosecuting attorney. *State v. Peterson*, 190 Wash. 668, 70 P.2d 306 (1937); See also RCW 4.44.180. In the present case, as in *Peterson*, the prosecutor to whom the juror was related did not participate in the trial....

State v. Kender, 21 Wn. App. 622, 626, 587 P.2d 551 (1978).

To obtain a new trial due to an allegation of implied bias by a juror, Lopez must demonstrate actual prejudice. *State v. Fire*, 145 Wn.2d

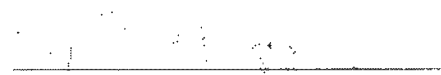
152, 34 P.3d 1218 (2001). Lopez cannot demonstrate actual prejudice in this case because juror number-four did not sit on his trial. *Id.*

D. Conclusion

There was no implied bias in regard to juror number-four because the juror was not a family member of the prosecutor. Even if there would have been implied bias, Lopez has not demonstrated prejudice. Juror number-four did not sit on the trial because Lopez used a peremptory strike to remove him. Even after striking juror number-four from the jury, Lopez had one peremptory strike remaining that he did not use. Thus, Lopez demonstrated that he was satisfied with the jury that heard his case and that he did not suffer any prejudice. Lopez was found guilty by a fair jury.

DATED: November 17, 2011.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)	
)	No. 41256-0-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
MICHAEL LOPEZ,)	
)	
Appellant,)	
_____)	

I, Tim Higgs, declare and state as follows:


On THURSDAY, NOVEMBER 17, 2011, I deposited in the U.S.

Mail, postage properly prepaid, the documents related to the above cause
number and to which this declaration is attached, SUPPLEMENTAL BRIEF
OF RESPONDENT, to:

Michael Lopez
#723940
Stafford Creek Correction Center
191 Constantine Way
Aberdeen, WA 98520-9504

I, Tim Higgs, declare under penalty of perjury of the laws of the
State of Washington that the foregoing information is true and correct.

Dated this 17th day of November, 2011, at Shelton, Washington.



Tim Higgs (WSBA #25919)

MASON COUNTY PROSECUTOR

November 17, 2011 - 2:22 PM

Transmittal Letter

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Case Name: State of Washington v. Michael Lopez

Court of Appeals Case Number: 41256-0


Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

 Brief: Supplemental Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): ____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: ____

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